Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

British Columbia Maritime Employers Association; DP World (Canada) Inc.,

applicants,

and

International Longshore and Warehouse Union, Local 500,

respondent.

Board File: 27171-C
Neutral Citation: 2009 CIRB **485**
November 27, 2009

The Canada Industrial Relations Board (the Board), composed of Ms. Louise Fecteau, Mr. Graham J. Clarke and Ms. Judith McPherson Vice-Chairpersons, considered the above-noted application for reconsideration.

Section 16.1 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. After reviewing all of the parties' written submissions and supporting materials in this application, the Board is satisfied that the documentation before it is sufficient to determine this matter without an oral hearing.

Counsel of Record

Mr. Donald J. Jordan for the British Columbia Maritime Employers Association and DP World (Canada) Inc.;
Mr. Bruce A. Laughton and Ms. Leah Terai for the International Longshore and Warehouse Union, Local 500.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson. The concurring reasons of Mr. Graham J. Clarke, Vice-Chairperson, follow.

I - Nature of the Application

[1] This is an application filed on November 20, 2008, by the British Columbia Maritime Employers Association and DP World (Canada) Inc. (the applicants) pursuant to section 18 of the *Code* requesting a reconsideration of the Board's decision in *British Columbia Maritime Employers Association and DP World (Canada) Inc.*, 2008 CIRB 423 (*BCMEA and DP World (423)*) (Board file no. 26943-C).

II - Background and Facts

[2] This matter relates to a complex labour relations dispute commencing on or around June 24, 2008, when DP World (Canada) Inc., a member of the British Columbia Maritime Employers Association (the employer), implemented revisions to the manner in which certain equipment was dispatched within the yard. The employer was expecting productivity improvements, but found instead that production rates dropped dramatically following this change. The employer alleged that the employees, represented by the International Longshore and Warehouse Union, Local 500 (the respondent or the union), were engaged in an illegal slowdown of work in violation of the collective agreement and sought a ruling from the parties' job arbitrator. The arbitrator, Mr. Ronald S. Keras, issued an oral ruling on June 26, 2008, followed by a written decision published on June 30, 2008, stating that the union members were engaged in a deliberate slowdown. In his decision, the arbitrator concluded that the new procedure had likely resulted in some delays during the

implementation period, but could not account for the extent of the productivity losses. The arbitrator was satisfied that a "significant portion" of the productivity loss was the result of a deliberate slowdown by some or all of the union members working at DP World. The arbitrator ordered the union and its members to cease the slowdown.

[3] On July 2, 2008, as productivity losses continued, the applicants filed an application with the Board, alleging that the union had authorized the employees to continue to engage in an illegal work slowdown in violation of section 91 of the *Code*. On July 8, 2008, following a hearing, the Board made a declaration of illegal strike and issued an order which, among other things, required the employees and the union to cease and desist from participating in any activities that constituted a strike as defined in section 3(1) of the *Code* (Board file no. 26928-C).

[4] On July 14, 2008, the applicants filed an application pursuant to section 23.1 of the *Code*, requesting that the Board file a copy of its July 8, 2008, cease and desist order with the British Columbia Supreme Court. The Board dismissed the applicants' request to file the order with the Court in *BCMEA and DP World (423)*, *supra,* the decision that is the subject of this reconsideration application.

III - The Parties' Positions

A - The Applicants

[5] The applicants allege that the Board's decision in *BCMEA and DP World (423)*, *supra*, reflects a failure of the Board to respect the principles of natural justice and contains errors of law or policy that cast doubt on the interpretation of the *Code*. With regard to the natural justice allegation, the applicants submit that the Board failed to hold an oral hearing and that it exhibited a bias against the applicants. In terms of the errors of law or policy, the applicants allege that the Board neglected to exercise its adjudicative authority to hear and determine the matter before it and that it exercised its discretionary authority under section 23.1 of the *Code* based on considerations that were inconsistent with section 15.1 of the *Code*.

[6] As a remedy, the applicants request that the Board overturn its decision in *BCMEA and DP World (423)*, *supra*, and remit the issue to a new panel.

1 - Violations of the Rules of Natural Justice

(a) Oral Hearing

[7] The applicants state that, in the circumstances of this case, the rules of natural justice require that the Board hold a hearing and permit cross-examination of witnesses. An oral hearing would have allowed them to effectively participate in the hearing and provide a factual basis for the Board's exercise of jurisdiction pursuant to section 23.1 of the *Code*. The applicants allege that the Board violated the rules of natural justice by failing to conduct a hearing into the significant factual differences between the parties' accounts relating to whether the Board's July 8, 2008, order was being complied with.

[8] Furthermore, the applicants submit that, although section 16.1 of the *Code* grants the Board discretionary authority to decide any matter before it without holding an oral hearing, use of that discretion must be consistent with the rules of natural justice. In this regard, the applicants rely on *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*). The applicants contend that an evaluation of the circumstances of this case based on the analysis in *Baker*, *supra*, should have led the Board to grant a full evidentiary hearing with cross-examination. The applicants add that, where credibility is an issue that affects the outcome of the matter, the parties have a legitimate expectation that the Board will resolve the opposing views of the facts. In this case, the diametrically opposed views of the parties, the Board's previous correspondence and the appointment of investigators to assist the Board in determining the matter created a legitimate expectation that written submissions would not be the basis for resolving the factual conflicts.

(b) Bias

[9] The applicants submit that the Board's repeated references in *BCMEA and DP World (423)*, *supra*, to its preference for a negotiated resolution and its identification of the employer as the party

that did not wish to pursue that path is evidence of bias on the part of the Board. Also, the applicants contend that, by failing to resolve the factual discrepancies and determine if the illegal conduct was continuing, the Board issued a judgment that favours the union's interests over those of the applicants in a biased manner. The applicants maintain that an allegation of reasonable apprehension of bias is contextual and fact specific (citing *Wewaykum Indian Band* v. *Canada*, 2003 SCC 45; [2003] 2 S.C.R. 259) and that the Board, as an adjudicative entity, is expected to meet a higher standard of impartiality than that to which bodies performing purely policy-making functions are held (citing *Newfoundland Telephone Co.* v. *Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623).They allege that the Board failed to meet this higher standard in this case.

[10] The applicants maintain that they did not raise an allegation of reasonable apprehension of bias earlier because it is only when the earlier statements of the Board are examined in light of the statements made in the decision under review that a reasonable apprehension of bias is made out.

2 - Errors of Law and Policy

(a) Failure to Decide

[11] The applicants acknowledge that section 23.1 of the *Code* grants the Board discretionary authority with regard to the filing of a Board order in a provincial superior court. They allege, however, that, when viewed in light of the other provisions of the *Code* granting the Board exclusive authority over allegations of illegal strike and orders resulting therefrom, section 23.1 cannot be interpreted as allowing the Board to refuse to resolve divergent views of the facts. According to the applicants, resolving these divergent views was a necessary step in determining whether to exercise its discretion. The applicants maintain that, in exercising its discretion pursuant to section 23.1 of the *Code*, the Board was required to hear the matter and determine the factual issue of whether the breach of the Board's order was continuing.

(b) Discretionary Authority Pursuant to Section 23.1 of the *Code*

[12] The applicants submit that the Board cannot, because of its stated preference for a negotiated resolution, ignore the Parliamentary intention clearly stated in section 15.1 of the *Code* to confer on the parties the right not to agree to meet and negotiate a resolution. They state that the exercise of discretion under section 23.1 of the *Code* must be consistent with the rights of the parties under section 15.1 and that the Board cannot, in the exercise of its discretion, be influenced by a party's willingness or unwillingness to engage in a negotiated resolution, when Parliament has left that decision solely to the applicants.

[13] The applicants submit that the Board relied on case law that predates the passage of section 15.1 in making its decision not to file the order in court. They contend that the factors outlined in *Seaspan International Ltd.* (1979), 33 di 544; and [1979] 2 Can LRBR 493 (CLRB no. 196); and *Maritime Employers' Association and Terminaux Portuaires du Québec* (1987), 72 di 26; and 88 CLLC 16,007 (CLRB no. 658) in relation to the exercise of discretion under the former section 123 (now section 23) of the *Code* no longer apply. The applicants submit that, with the addition of section 15.1 of the *Code*, the Board can no longer direct the parties or play an active role in requiring the parties to explore other accommodative measures for resolving disputes. Thus, the applicants state, the Board's decision in *BCMEA and DP World (423)*, *supra*, is fundamentally flawed in its reliance on those cases.

B - The Respondent

[14] The respondent submits that the application for reconsideration should be dismissed. It argues that the Board respected the principles of natural justice and did not make any error of law or policy that casts serious doubt on the interpretation of the *Code*.

1 - Violations of the Rules of Natural Justice

(a) Oral Hearing

[15] The respondent denies any breach of the principle of natural justice by the Board. It states that, although they knew of the differences between the parties' views of the facts, the applicants did not request a hearing prior to the issuance of the Board's decision in *BCMEA and DP World (423)*, *supra*. They accordingly waived any right to raise the issue of procedural fairness. The respondent relies on section 16.1 of the *Code* for the authority that the Board may decide any matter before it without holding an oral hearing, and states that under section 10(g) of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*), an applicant must state whether a hearing is being requested and, if so, give the reasons for the request. The respondent submits that the applicants are only now complaining about the lack of an oral hearing because the decision went against them.

[16] Discussing the factors set out in *Baker*, *supra*, the union asserts that the duty of fairness is flexible and that meaningful participation can occur in different ways in different situations. An oral hearing is not always necessary to ensure a fair hearing. The Board, as master of its own proceedings, has the discretion to decide when an oral hearing is required.

(b) Bias

[17] The respondent submits that an allegation of bias ought to have been raised in the applicants' submissions to the original panel. It maintains that the circumstances being relied on by the applicants to allege bias were known to them prior to the issuance of the Board's decision in *BCMEA and DP World (423)*, *supra*. The respondent submits that, in these circumstances, the applicants cannot be said to have raised this allegation at the earliest practicable opportunity and must be found to have waived their objection of bias.

[18] In addition, the respondent states that an allegation of bias is a serious one and that the grounds must be substantial (citing *R.* v. *S. (R.D.)*, [1997] 3 S.C.R. 484). The respondent submits that the

applicants have not met the onus to provide clear evidence to overcome the presumption that the Board acted with integrity. Furthermore, the respondent claims that, when the Board made inquiries as to whether or not a resolution could be reached, it was fulfilling its normal functions and acting in a manner consistent with its long-standing practice, rather than demonstrating a bias.

2 - Errors of Law or Policy

(a) Failure to Decide

[19] Concerning the applicants' allegation that the Board refused to decide between the parties' opposing views of the facts, the respondent submits that the applicants' characterization of the Board's decision in *BCMEA and DP World (423)*, *supra*, is wrong. It maintains that the Board found that it was not abundantly clear that the union was deliberately defying or failing to comply with the Board order. In addition, according to the respondent, the Board held that it was abundantly clear that the interests of constructive labour management relations would not be served by filing the order in court. Based on the foregoing, the respondent states that the Board properly exercised its adjudicative authority.

(b) Discretionary Authority Pursuant to Section 23.1 of the *Code*

[20] The respondent maintains that the Board's exercise of its discretion under section 23.1 of the *Code* in the decision under review was consistent with the *Code* and the Board's jurisprudence. It submits that the addition of section 15.1 to the *Code* did not change the Board's role, but rather reflected its longstanding practice of encouraging resolution of disputes. It did not result in the removal of any previous power of the Board to compel or direct parties to engage in alternative dispute resolution. The respondent maintains that the Board did not possess the authority to so order prior to the enactment of section 15.1, nor does it possess this authority presently. The Board jurisprudence relied on by the Board in the decision under review remains valid and applicable in the circumstances. The respondent submits that the Board's decision was made within the bounds of the discretion permitted under section 23, and that such discretion was not inconsistent with or contrary to the content of section 15.1 of the *Code*.

IV - Analysis and Decision

[21] Section 18 of the *Code* provides that the Board may "review, rescind, amend, alter or vary any order or decision made by it." The Board's general power to reconsider its decisions has been explained in numerous Board decisions, which have established the main grounds that may be asserted in an application for reconsideration. Those grounds are now set out in section 44 of the *Regulations* as follows:

> 44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the *Code* include the following:
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> (a) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;
>
> (b) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board;
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> (c) a failure of the Board to respect a principle of natural justice; and
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> (d) a decision made by a Registrar under section 3.

[22] The role of the reconsideration panel is to determine whether the application for reconsideration raises any of the grounds for review stated above. Its role is not that of an appeal body and its function is not to reinterpret findings of fact already made by the Board nor substitute its discretion for that of the original panel.

A - Errors of Law or Policy

[23] The reconsideration panel will deal with the alleged errors of law and policy first, as this appears to be the essence of the applicants' objection to the decision under review and these arguments flow through to the remainder of the applicants' submissions and the allegations of breaches of natural justice.

1 - Failure to Decide

[24] The applicants reproach the Board for failing to resolve the parties' divergent views of the facts before it exercised its discretion under section 23.1 of the *Code*. They argue that it was necessary in the circumstances for the Board to resolve the factual conflicts between the parties and make a determination as to whether or not the work slowdown was continuing. This is also why they believe that an oral hearing was required and why a legitimate expectation that a hearing would be held had been created.

[25] With respect, the reconsideration panel does not agree. The Board had wide discretion under sections 23 and 23.1 to determine the issue before it, namely whether it would be appropriate to file its order in court as a means of enforcement.

[26] Sections 23 and 23.1 of the *Code* provide as follows:

> 23.(1) The Board shall, on the request in writing of any person or organization affected by any order or decision of the Board, file a copy of the order or decision, exclusive of the reasons therefor, in the Federal Court, unless, in the opinion of the Board,
>
> (a) there is no indication of failure or likelihood of failure to comply with the order or decision; or
>
> (b) there is other good reason why the filing of the order or decision in the Federal Court would serve no useful purpose.
>
> ...
>
> 23.1 The Board may, on application by a person or organization affected by an order or decision of the Board, file a copy of the order or decision, exclusive of the reasons for it, in the superior court of a province. Section 23 applies, with the modifications that the circumstances require, to an order or decision filed in such a superior court.

[27] These sections of the *Code* require the Board to formulate an opinion as to whether to file a Board order in court (see *NAV Canada* v. *Canadian Air Traffic Control Association* (1999), 250 N.R. 321 (F.C.A.)). To formulate this opinion, the Board must take into consideration sections 23(1)(a) and 23(1)(b) of the *Code*. Section 23(1)(a) suggests that one good reason for not filing an order in court is a lack of indication of failure or of likelihood of failure to comply with the order. Section 23(1)(b) indicates that there may be other good reason not to file an order in court. This means that the Board may decide not to file an order in court even if there is evidence of failure

or the likelihood of failure to comply with the order. It is up to the Board to form an opinion as to whether, in any given case, the circumstances in either (a) or (b) exist, so as to persuade it not to file the order in court. As Board jurisprudence indicates, the Board's discretion under (b) is very broad and the Board is entitled to use its judgment and expertise to determine whether, for labour relations reasons and in furtherance of the objectives of the *Code*, filing the order in court, even where there is some indication that the Board's order is not being fully complied with, would serve no useful purpose (see, for example, *Iberia, Airlines of Spain* (1988), 72 di 222 (CLRB no. 671); and *Maritime Employers' Association and Terminaux Portuaires du Québec*, *supra*).

[28] In the view of the reconsideration panel, the original panel correctly stated the applicable principles and criteria and exercised its discretion in a reasonable fashion.

[29] In the decision under review, the panel described the evidence given by the parties at two previous hearings, which the job arbitrator and then the Board had relied on in finding that both parties were contributing to the employer's productivity losses. Both the job arbitrator and the Board found that the degree to which each was responsible was unclear. There were delays caused by the new process that had not been addressed by the employer and there was evidence of a deliberate slowdown by the employees. This is what led the Board to issue the cease and desist order that the employer is seeking to have filed in court. The original panel stated that the parties' respective positions remained widely divergent, with each continuing to blame the other for the continued low productivity levels, and candidly admitted that it was unable to reconcile their respective explanations. Consequently, it could not determine conclusively on the evidence whether the employees were continuing the work slowdown and thus defying the Board's cease and desist order.

[30] The employer argues that the Board was required to reconcile the evidence and make such a determination before deciding whether to file the order in court. However, the reconsideration panel is of the view that the Board was not required to do so as a matter of law or policy. In assessing the circumstances of this case, the original panel was unable to invoke or rely upon section 23(1)(a) to decide not to file the order in court, as it could not determine conclusively that there was "no indication of failure or likelihood of failure to comply with the order." However, it could still proceed to consider whether there was other good reason why it would serve no useful purpose to

file the order in court, pursuant to section 23(1)(b). It concluded that there was other good reason.

[31] While the original panel could perhaps have been more precise, its statements indicate that it believed that there had been a significant breakdown in labour relations and that subjecting employees to the potential consequences of a court-enforced order, namely fines or incarceration, would not resolve the underlying labour relations breakdown and would appear to be a punitive response rather than a constructive settlement of the dispute. The original panel indicated that, in its opinion, this punitive action was not appropriate in circumstances where it was not clear that there was deliberate defiance of the Board's order and it wanted to give the parties the opportunity to explore other means of resolving their dispute and ensuring compliance before resorting to the court. The relevant statements of the original panel are as follows:

> [14] ...The Board will not lightly subject the parties to a labour-management relationship to measures of this nature, unless it is clear that there is no other enforcement mechanism that will ensure compliance with the Board's Order and the objectives of the *Code*.
>
> ...
>
> [21] The Board's role is not to punish parties, but to remedy breakdowns in labour relations. Placing employees, collectively, in a situation in which they could be subject to fines and/or incarceration when it is not abundantly clear that they are deliberately defying or failing to comply with a Board Order is not an outcome that the Board can or should tolerate. Moreover, it is abundantly clear to the Board that the interests of constructive labour management relations would not be served by the filing of the Board's July 8, 2008 Order in court, and the Board therefore declines to do so.
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> (*BCMEA and DP World (423)*, *supra*)

[32] At paragraph 12 of its decision, the original panel cited the decision of the Board's predecessor, the Canada Labour Relations Board (CLRB), in *Seaspan International Ltd., supra*, which reads in part:

> ...The Board is to be sensitive and responsive to the parties' social, economic and political positions in their labour relations environment and have as its primary goal constructive accommodation. The last or another ounce of retribution in strict compliance with a Board order may not in some exceptional circumstances further future good relations, particularly where other Board recourse or intervention can achieve the same results in another manner.
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> (pages 554; and 500-501)

[33] In the decision under review, the Board determined that it was not sufficiently clear that the employees were deliberately defying or failing to comply with the order and that, in any event, it was not in the best interest of all concerned to file the Board's order in court.

[34] Based on the above, it is the reconsideration panel's view that the Board decided the section 23.1 application based on the wording and principles outlined in the *Code* and within the bounds of its intended discretion. In the circumstance of this case, it was not necessary for the Board to first resolve the divergent views of the facts in order to exercise its discretion to determine the application before it.

2 - Discretionary Authority Under Section 23.1, Interference with Rights Under Section 15.1

[35] The applicants submit that the original panel exercised its discretion under section 23.1 of the *Code* in a manner that ignored section 15.1 of the *Code*, specifically, the right of a party under that section not to agree to meet and negotiate a resolution. In this regard, the applicants submit that the Board relied on case law that predates the passage of section 15.1, thereby rendering its decision in *BCMEA and DP World (423)*, *supra*, fundamentally flawed.

[36] Section 15.1 reads as follows:

> 15.1 (1) The Board, or any member or employee of the Board designated by the Board, may, if the parties agree, assist the parties in resolving any issues in dispute at any stage of a proceeding and by any means that the Board considers appropriate, without prejudice to the Board's power to determine issues that have not been settled.
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> (2) The Board, on application by an employer or a trade union, may give declaratory opinions.

[37] Section 15.1 was added to the *Code* as part of its 1999 amendments. However, in the opinion of the reconsideration panel, the addition did not change the Board's powers in relation to engaging parties to participate in mediation and other forms of dispute resolution. Rather, it reinforced the Board's existing practice of encouraging parties to attempt to resolve any issues in dispute between them and offering its assistance in this regard.

[38] With regard to section 15.1 of the *Code*, in Andrew C.L. Sims, *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Human Resources Development Canada, 1995) (the Sims Report), the consensus committee's view on alternative dispute resolution was that it should not be imposed on the parties, but only encouraged, and that there was accordingly no need for any modification to the *Code* (see the Sims Report). Furthermore, in *Canadian National Railway Company*, 2006 CIRB 362, the Board confirmed the continuation of its long-standing practice as follows:

> [37] The Board is committed to assisting parties in resolving disputes and reaching a settlement of complaints or applications filed before the Board prior to their formal adjudication or final determination by a panel of the Board. This has been a long-standing practice of the Board, in which its professional staff and panel members continue to participate. This commitment is reflected in several provisions of the *Code*, in addition to the general statement of the statutory purpose and objectives contained in its preamble. The addition of section 15.1 to the *Code* in 1999 reflects the Board's enhanced and expressed commitment to this informal mediation process and settlement discussions. ...

[39] Both of these authorities indicate that the Board did not previously have any authority to force the parties to engage in settlement discussions against their wishes or absent their consent, and the introduction of section 15.1 is seen as enhancing the existing commitment to assist with consensual informal settlement processes. It does not grant or take away any power to impose mediation or force participation in settlement discussions upon a party.

[40] In *Seaspan International Ltd.*, *supra*, the CLRB determined that it had broad discretion not to file an order in court. It described the criteria applied by it in relation to section 123 (now section 23) of the *Code*, which criteria were reaffirmed in *Maritime Employers' Association and Terminaux Portuaires du Québec*, *supra*. Since the addition of section 15.1 to the *Code* in 1999 reinforced previous Board practice and did not affect the Board's power, it did not render the above-mentioned cases obsolete or no longer valid, and the Board did not make an error of law by relying on them.

[41] Furthermore, the Board exercised its discretion in compliance with the wording of section 23 of the *Code* and with consideration for the broader principles of the *Code*. The Board's exercise of discretion was based on the fact that, in circumstances where it is not "abundantly clear" that the employees are deliberately defying or failing to comply with the order, the parties should be given the opportunity to explore other means of resolving their dispute without the threat of fines and/or

incarceration hanging over their heads. This determination was consistent with the wording of section 23 and the Preamble to the *Code*, which promotes free collective bargaining and the constructive settlement of disputes.

[42] Other means of resolving disputes may include assistance from the Board, in which case section 15.1 of the *Code* requiring the agreement of the parties comes into play; or the parties may come up with their own solution. In *BCMEA and DP World (423)*, *supra*, the Board did not require the parties to resolve their dispute with its assistance, and its discretion was not based on the application of section 15.1 of the *Code*. Rather, the Board encouraged the parties to resolve their issues between themselves, without resort to the formal adjudication process, as the Board was of the opinion that this solution would contribute to more constructive labour relations. In labour relations, this type of solution can be preferable for many reasons, including the fact that "[s]olutions to issues particular to a relationship which are achieved through mutual agreement by the affected parties are more likely to be acceptable and sustainable in the long term than are remedies imposed by a third-party adjudicator" (see *Canadian National Railway Company*, *supra*, paragraph 36). Furthermore, as the CLRB stated in *Seaspan International Ltd.*, *supra*, section 23 should not be viewed as a simple procedural route to filing and subsequent enforcement of Board orders. Rather, the wording of section 23 suggests that the Board should consider the more comprehensive, non-punitive, labour relations problem-solving role assigned to it under the *Code*.

[43] Having carefully considered the parties' submissions in this case and reviewed the Board's jurisprudence relating to section 23 of the *Code*, the reconsideration panel considers that the Board correctly applied the relevant principles and criteria and exercised its discretion in a reasonable fashion, consistent with other provisions of the *Code*. Consequently, the Board does not consider that it committed any error of law or policy in rendering its decision in *BCMEA and DP World (423)*, *supra*.

B - Principles of Natural Justice

1 - Oral Hearing

[44] The applicants state that the Board should have held an oral hearing and permitted cross-examination of witnesses in order to allow them to effectively participate in the hearing and provide a factual basis for the Board's exercise of discretion pursuant to section 23.1 of the *Code*. The applicants add that the rules of natural justice and their legitimate expectation dictated that an oral hearing be held in this case.

[45] The Board often does not hold oral hearings when the relevant facts can be presented to it by way of written submissions. The Board notes that, in their section 23.1 application, the applicants did not request an oral hearing. The applicants had ample opportunity to put forward their evidence and argument in their submissions and in their reply to the union's submissions. Furthermore, when the Board sought additional information, requesting written submissions in response to specific questions, the applicants did not request an oral hearing, nor did they request the opportunity to present further evidence or argument.

[46] Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing, whether or not an oral hearing is requested. The Federal Court of Appeal upheld the Board's discretion in this regard in *NAV Canada* v. *International Brotherhood of Electrical Workers, Local 2228*, 2001 FCA 30. Furthermore, the Board is not required to notify the parties of its intention not to hold an oral hearing in a particular case (see *NAV Canada* v. *International Brotherhood of Electrical Workers, Local 2228*, *supra*).

[47] The reconsideration panel is of the view that, contrary to the applicants' allegations, the Board's conduct of the matter and the process it followed were consistent with the factors outlined in *Baker, supra*. In that decision, the Court recognized the variable nature of the concept of procedural fairness and the fact that the requirements of natural justice and procedural fairness are dependent on the circumstances of each case. The Court indicated that various factors must be considered in any given set of circumstances, such as the nature of the tribunal itself, its expertise, the nature of the question

before it, the statutory scheme and the context in which the question arises, the importance of the decision to the party affected, and the tribunal's choice of procedure. It is thus recognized that administrative tribunals are masters of their own proceedings and require flexibility in fulfilling their statutory functions. It is generally acknowledged that procedural fairness does not always require an oral hearing and that meaningful participation can be achieved in other ways. Parliament, by way of section 16.1 of the *Code*, has granted the Board extensive discretion to determine the circumstances under which an oral hearing may be necessary based upon its expertise in its field.

[48] The applicants claim that the lack of an oral hearing in this case breached the rules of natural justice by not giving them the opportunity to fully participate in the hearing and lay the factual foundation for the exercise of the Board's discretion under section 23.1 of the *Code*. Section 10(d) of the *Regulations* states that the parties must provide the Board with full particulars of the facts and the grounds on which they rely in their application and, as mentioned above, the applicants were given numerous opportunities to do so. Furthermore, as discussed in detail above, sections 23 and 23.1 of the *Code* do not require the Board to resolve all of the underlying factual conflicts in order to determine the issue before it and exercise its discretion under section 23.1. The Board was justified in deciding not to hold an oral hearing in the circumstances of this case, as the outstanding evidence and credibility issues were not essential to the outcome of the matter or a prerequisite to the Board's formulation of its opinion under section 23.1 of the *Code*. This was particularly so because the Board found, under section 23 (1)(b), that there was other good reason why the filing of the order in court would serve no useful purpose. In light of the above, the reconsideration panel is not persuaded that the applicants were denied the right to be heard or otherwise denied procedural fairness in the context of the determination of this matter by the Board.

[49] The Board's correspondence to the parties in Board file no. 26943-C gives no suggestion that an oral hearing was to be held or was being contemplated. Though the applicants objected to the investigatory process itself, they did not subsequently request that this process be replaced by an oral hearing. This remained the case even after the Board decided that it would not consider the investigation report and asked the parties for additional information by way of written submissions. Given the broad discretionary powers granted to the Board under section 16.1 of the *Code*, the Board's request for further written submissions and the fact that the applicants did not request an oral

hearing, the reconsideration panel is not persuaded that the Board created an expectation that an oral hearing would be held.

[50] As a result, the reconsideration panel is of the view that the Board fully accorded the applicants the opportunity to present evidence and make argument in accordance with the standards and mechanisms set out in the *Code*, the Board's previous practice and jurisprudence and the principles of natural justice and procedural fairness.

2 - Bias

[51] The applicants raise two arguments to support their allegation of a reasonable apprehension of bias with respect to the Board's decision in *BCMEA and DP World (423)*, *supra*. The first is that, in arriving at its decision, the panel was biased against them for having refused to engage in negotiations and/or discussions aimed at resolving the dispute with the union. The second is that the Board's decision not to resolve the factual differences to determine whether the illegal conduct was continuing, was a decision that favoured the interests of the union over those of the applicants in a biased manner.

[52] This reconsideration panel has carefully reviewed those arguments and is of the opinion that the applicants have not provided tangible evidence to establish a reasonable apprehension of bias.

[53] The impartiality of the panel chair and members is essential and must be presumed unless there is evidence to the contrary. Therefore, in an application alleging bias, the onus of establishing the bias is on the party making the allegation and the standard is one of proof on a balance of probabilities (see *VIA Rail Canada Inc.*, 2007 CIRB 381). Authors David Phillip Jones and Anne S. de Villars state the following with regard to establishing a reasonable apprehension of bias:

> (T)he onus of establishing a reasonable apprehension of bias is on the party making the allegation. **The tribunal has no onus to justify its conduct in the face of a bare allegation; it has, at most, a strategic onus of fending off allegations** of bias that would otherwise be sufficient to establish a prima facie case. **The applicant has to establish a case. Mere speculation will not do.**
>
> (*Principles of Administrative Law*, 3rd ed. (Scarborough: Carswell, 1999), page 401; emphasis added)

[54] In cases where it is alleged that the Board or one of its members is biased, the Board will examine whether a reasonable apprehension of bias has been established. The Supreme Court of Canada, in *R.* v. *S. (R.D.)*, *supra*, confirmed that the test for bias contains a two-fold objective element:

> The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty* v. *National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:
>
> "[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. ... [The] test is 'what would an informed person, viewing the matter realistically and practically–and having thought the matter through–conclude. ...' "
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. ... Further the reasonable person must be an **informed** person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background...
>
> ...
>
> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. ...
>
> (pages 530–531, and 532)

[55] The reconsideration panel is of the view that the Board's encouraging parties to settle or offering assistance in resolving disputes, even if done a number of times where a party declines, does not, in and of itself, demonstrate bias against that party. Consequently, in the present matter, it finds that the applicants have failed to establish that the Board was biased against them merely because they chose not to participate.

[56] As indicated above, the Board has a longstanding commitment to and practice of encouraging informal methods of dispute resolution and has enunciated the benefits of such informal resolution over adjudication and the rendering of a decision by a third-party decision-maker such as the Board. The reconsideration panel has already found that this is not inconsistent with parties' rights under section 15.1 to choose not to participate. It is not uncommon for the Board, while it proceeds with

its processing of a file for adjudication, to remind the parties that mediation services are available and that parties remain free to continue to explore alternative means of resolution. This does not mean that if one party refuses the Board's offers to engage in mediation, the Board will rule against that party based on its refusal. Nothing presented to this reconsideration panel has persuaded it that the ultimate decision of the Board in *BCMEA and DP World (423)*, *supra*, was due to the applicants' decision not to participate in mediation offered by the Board. Mere statements by the Board in the decision under review indicating a preference for a mediated resolution of this particular matter cannot reasonably and objectively be seen as exhibiting a bias against the applicants for choosing not to participate. Such does not meet the high onus for establishing bias or the apprehension of bias as the test is set out above.

[57] The second aspect of the applicants' bias allegation is that, by failing to determine if the illegal conduct was continuing, the Board issued a judgment that favoured the union's interests over those of the applicants in a biased manner. While the employer may not be satisfied with the outcome of the Board's decision in *BCMEA and DP World (423)*, *supra*, this in and of itself does not constitute grounds to establish bias (see *TELUS Communications Inc.*, 2005 CIRB 317).

[58] A review of the process followed indicates that, once the suggestion to negotiate a resolution of the underlying issues was rejected, the Board attempted to obtain evidence from the parties as to the reasons behind the continued productivity losses.

[59] First, the Board appointed two of its members to conduct an investigation and to report back on their findings. The applicants expressed strong disagreement with this approach and ultimately the members recused themselves. The Chair assigned a new panel and determined not to take into account any of the findings of the members' investigation. The applicants' concerns and objections were thereby addressed in a fair and reasonable manner.

[60] The Board then asked the parties for written submissions, in the form of responses to specific questions. However, those submissions proved unhelpful in furthering the Board's understanding of the reasons for the continuing low productivity and the relative contribution of each party to it. The results of the two previous hearings held to determine the same or similar issues had not

permitted the job arbitrator or the Board to fully resolve the factual discrepancies between the parties regarding the direct cause and effect or contribution by each party to the productivity losses. The applicants did not request a hearing at that stage and they failed to satisfy this reconsideration panel that the original panel had to determine these discrepancies in order to render its decision on the application before it. The original panel proceeded to make its determination on the application in a manner consistent with the Board's jurisprudence under sections 23 and 23.1.

[61] As discussed in more detail above, it was not necessary for the Board to fully ascertain the exact causes of the continued lower productivity in order to make its determination under section 23.1 that there was other good reason why the filing of the order in court would serve no useful purpose. Bearing in mind its role in encouraging the constructive settlement of disputes rather than punishing the parties, the Board in essence concluded that it was not abundantly clear that there was a failure or likelihood of failure to comply with the Board's order and that there was other good reason why the filing of the order in court for enforcement would serve no useful purpose. It recognized a labour relations purpose, benefiting both parties, which led it to exercise its discretion not to file its order in court.

[62] The reconsideration panel is not persuaded that the Board's decision not to further resolve the factual discrepancies or hold an oral hearing was based on a desire to favour the interests of the union, or that such a decision exhibited bias or gave the appearance of bias in favour of the union's interests over those of the applicants.

[63] Based on the above, the reconsideration panel is of the view that the evidence produced by the employer does not meet the high threshold required to be met to establish that the decision under review gave rise to a reasonable apprehension of bias. As a result, the applicants' bias argument is dismissed.

V - Conclusion

[64] For all of these reasons, the reconsideration panel concludes that the applicants have not established grounds for reconsideration of the decision under review. A reconsideration panel is not

to substitute its own discretion for that of the panel seized of the original matter. This panel is not satisfied that there are any reasons it should do so or that there are any other reasons it should interfere with the Board's decision in *BCMEA and DP World (423)*, *supra*. Accordingly, the present reconsideration application is dismissed.

Ms. Louise Fecteau
Vice-Chairperson

Ms. Judith F. MacPherson, Q.C.
Vice-Chairperson

Concurring Reasons for Decision of Mr. Graham J. Clarke, Vice-Chairperson

[65] I have had the benefit of reading the Reasons written by Vice-Chairperson Fecteau in this matter.

[66] I agree with Vice-Chairperson Fecteau's conclusion that, in *BCMEA and DP World (423)*, *supra*, the Board was not required to hold an oral hearing.

[67] In addition, I agree that the applicant has not made out a case for bias.

[68] I have nothing to add on these two issues.

[69] Finally, given that a reconsideration panel's role is not to substitute its discretion for that of the original panel that heard the case, I similarly would not intervene to come to a different result or remit the matter to another panel of the Board.

[70] Sections 23 and 23.1 of the *Code* establish the Board's enforcement mechanism (*Jean-Paul Roy* (1985), 59 di 142; and 10 CLRBR (NS) 175 (CLRB no. 495)).

[71] For ease of reference, sections 23 and 23.1 of the *Code* read as follows:

> 23.(1) **The Board shall**, on the request in writing of any person or organization affected by any order or decision of the Board, file a copy of the order or decision, exclusive of the reasons therefor, in the Federal Court, **unless**, in the opinion of the Board,
>
> (a) there is no indication of failure or likelihood of failure to comply with the order or decision; or
>
> (b) there is other good reason why the filing of the order or decision in the Federal Court would serve no useful purpose.
>
> ...
>
> 23.1 **The Board may**, on application by a person or organization affected by an order or decision of the Board, file a copy of the order or decision, exclusive of the reasons for it, in the superior court of a province. Section 23 applies, with the modifications that the circumstances require, to an order or decision filed in such a superior court.
>
> (emphasis added)

[72] In *BCMEA and DP World (423)*, *supra*, the Board cited in paragraph 12 an extract from a decision of the Board's predecessor, the Canada Labour Relations Board (CLRB), in *Seaspan International Ltd.*, *supra*, that considered how to apply section 23. The CLRB correctly noted that the analysis for a request to file a Board order starts with the underlying premise that the filing of an order is initially mandatory:

> Let us turn now specifically to the new provisions of section 123 [now section 23]. Filing of Board orders on the written request of a person or organization affected by a Board order or decision is mandatory **unless** "*in the opinion of the Board*" one of two circumstances prevail. ...
>
> (pages 553; and 500)

[73] There are three principles to consider in determining whether to file a Board order in court.

1. The filing of a Board order is initially considered mandatory

[74] Section 23 starts with the words: "The Board shall."

[75] While section 23.1 starts with the words "[t]he Board may," that simply refers to the fact that, as an alternative to section 23, the Board may now also file an order in a superior court of a province.

The word "may" does not make section 23.1 any less mandatory than the word "shall" in section 23.

[76] The fact that the filing of an order is initially mandatory illustrates the well-known principle that where there is a right, there is a remedy (*ubi jus, ibi remedium*). Otherwise, one could question the utility of any tribunal making a decision on the merits of a case if there is no corresponding remedy.

[77] The Board has no enforcement mechanism of its own. That obliges it to draft proper orders that are capable of enforcement and, upon request, to file them in either the Federal Court or a provincial superior court for enforcement purposes (*International Brotherhood of Electrical Workers, Local No. 529* v. *Central Broadcasting Co. Ltd.*, [1977] 2 F.C. 78).

[78] While the *Code*'s language regarding the filing of an order is initially mandatory, the *Code* then grants the Board a significant discretion.

2. Exception 1: unless there is no indication of failure or likelihood of failure to comply with the order or decision (section 23 (1) (a))

[79] While the filing of an order is initially mandatory, the *Code* has granted the Board significant flexibility, in recognition of its expertise over labour relations matters. This flexibility differs from the situation in some provinces where a labour board has no discretion but must file its order in court if requested to do so. For example, section 135 of British Columbia's *Labour Relations Code*, R.S.B.C. 1996, c-244 states the following:

> 135(1) The board must on request by any party or may on its own motion file in a Supreme Court registry at any time a copy of a decision or order made by the board under this Code or a collective agreement.
>
> (2) The decision or order must be filed as if it were an order of the court, and on being filed it is deemed for all purposes except appeal from it to be an order of the Supreme Court and enforceable as such.
>
> (3) For the purposes of this section, a designation or direction under Part 6 is deemed to be a decision or order of the board.

[80] Prior to filing the order under section 23 or 23.1, the Board can consider whether there has been a failure to comply with the order or a likelihood of non-compliance. Evidently, it is up to a

respondent which would like the Board to exercise this discretion in its favour to present evidence demonstrating that there has been no indication of failure or likelihood of failure to respect the Board's order.

[81] The Board recently exercised the discretion under section 23(1)(a) in *TQS Inc.*, 2009 CIRB 444, after the respondent provided sufficient evidence to convince the Board that its order had been complied with and, further, that there was no suggestion of non-compliance in the future.

[82] It is up to the Board rather than a court to make this determination regarding compliance, since it is "the best authority to interpret the meaning of its decision and order" (*Seaspan International Ltd.*, *supra*, pages 553; and 500).

[83] Similarly, particularly in illegal strike or lockout situations where the Board must decide cases on an expedited basis, the passage of time and the parties' submissions may convince the Board to modify its original order under section 18 of the *Code* rather than file it in court.

[84] Under section 23(1)(a), the Board essentially asks itself whether the evidence shows no indication of failure to comply with its order or any likelihood of such failure.

[85] Even if an indication of failure exists, the Board still has a second exception to consider when exercising its discretion.

3. Exception 2: there is other good reason why the filing of the order or decision in court would serve no useful purpose (section 23(1)(b))

[86] In *Seaspan International Ltd.*, *supra*, the CLRB also commented on this second discretionary ground:

> ... In short, the focus is not on strict adherence to principles requiring obedience in an ordered society to orders of the courts. Rather it is recognized that the Board must act as a flexible instrument in the often shifting labour relations climate where further proceedings on its decisions can be futile or contrary to the evolved circumstances. ...
>
> (pages 554; and 500)

[87] This second ground requires the Board to find "other good reason" why the filing would serve "no useful purpose."

[88] If the Board does not conclude that the filing would serve no useful purpose, then the applicant is entitled to its remedy.

Conclusion

[89] A reconsideration panel does not substitute its discretion for that of the panel that heard the original case.

[90] For the purpose of applying sections 23 and 23.1 of the *Code*, the Board examines the following principles:

> 1. The Legislator intended that the filing of an order with the court be, initially at least, mandatory;
>
> 2. The Board can refuse to file the order if the evidence establishes that there is no indication of failure or likelihood of failure to comply with the order; or
>
> 3. Whether or not there is an indication of failure or the likelihood of failure to comply with the order, the Board can refuse to file the order if the evidence demonstrates that there is other good reason why the filing would serve no useful purpose.

[91] In *BCMEA and DP World (423)*, *supra*, the original panel determined, based on the evidence before it, that there was good reason why the filing would serve no useful purpose, including the fact that litigation over the order in court would not, in the Board's estimation, resolve the ongoing underlying labour relations issues separating the parties.

[92] That exercise of discretion was one the original panel was entitled to make based on the evidence before it.

_____
Graham J. Clarke
Vice-Chairperson